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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 273 35

THE BOARD OF COMMISSIONERS OF THE COUNTY OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

EDWARD SALLINGER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

FILED SEPTEMBER 6, 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

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1 Circuit Court, 4th Circuit.

UNITED STATES OF AMERICA, *Eastern District of North Carolina:*

Be it remembered that on the 18th day of August, 1879, Edward Sallinger, a citizen of the State of New York, filed a bond and prosecuted out of the circuit court of the United States for the said eastern district of North Carolina against The Board of Commissioners of Washington County, who are citizens of the State of North Carolina, a summons, which summons and bond are in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA, *Eastern District of North Carolina:*

Circuit Court, 4th Circuit.

EDWARD SALLINGER
against
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY.

The President of the United States of America to the marshal of the eastern district of North Carolina, Greeting:

2 You are hereby commanded to summon the Board of Commissioners of Washington County, citizens and residents of the eastern district of North Carolina, to appear before the judges of the circuit court of the United States, at the next term of said court, to be held for the district aforesaid at Raleigh, on the last Monday in November next, then and there to answer the complaint of Edward Sallinger, the plaintiff herein, citizen and resident of the State of New York, which complaint will be filed in said court within the first three days of said term; and let the said defendants take notice that if they fail to answer the said complaint within the time limited by law the plaintiff will take judgment in the sum of one thousand dollars, with interest from the 7th October, 1878, at the rate of 6 per centum, and for costs.

Herein fail not, and have you then and there this summons.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Raleigh, in said district, the 18th day of August, 1879, and in the 104th year of the Independence of the United States.

[SEAL.] N. J. RIDDICK, *Clerk.*

3 *Prosecution Bond.*

UNITED STATES OF AMERICA, *Eastern District of North Carolina:*

Circuit Court, Fourth Circuit.

EDWARD SALLINGER
against
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY, N. C.

Know all men by these presents that we, Edward Sallinger, as principal, and L. H. Hornthal as surety, are held and firmly bound

unto the defendant in the above-entitled action in the sum of three hundred dollars, to the payment of which we bind ourselves firmly by these presents. Sealed with our seals, and dated this 18 day of August, 1879.

The condition of the above obligation is such that whereas the plaintiff in the above-named cause has brought his action against the said defendant therein, now, if the said plaintiff shall prosecute his action with effect, or, in case he fail therein, shall well and truly pay to the defendant all such costs and damages as shall be awarded and recovered against the said plaintiff, then the above obligation is to be void; otherwise it is to remain in full force and effect.

(S'g'd) EDWARD SALLINGER. [SEAL.]
By GILLIAM & GATLING, *Atty's.*
(S'g'd) L. H. HORNTHAL. [SEAL.]

Taken and acknowledged before me, this 26th day of September, 1879, by L. H. Hornthal, surety.

J. A. MELSON, *Clerk.*

4 And on the return-day of said writ, on the last Monday in November, 1879, at the court-house in Raleigh, in said Eastern district of North Carolina, before the honorable Geo. W. Brooks, judge of the United States court for the eastern district of North Carolina, present and holding said court, J. B. Hill, marshal of aforesaid district, returns said writ, endorsed as follows:

"Executed this 4th of Oct., 1879.

J. B. HILL, *U. S. Marshal,*
By T. W. BELL,
Deputy U. S. Marshal."

And thereupon the said Edward Sallinger comes and complains, by his attorneys, Gilliam & Gatling, as follows:

Complaint.

Eastern District of North Carolina, Circuit Court of the United States.

EDWARD SALLINGER
vs.
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY.

The plaintiff, Edward Sallinger, who is a citizen of the State of New York, complains of the defendants, the board of com-
5 missioners of Washington county, who are citizens of the State of North Carolina, residing in the eastern district aforesaid, and alleges:

I. That the defendant is a corporation formed and organized under the laws of North Carolina, and represent- the county of Washington in its rights and responsibilities.

II. That on the first day of October, 1877, one Louis M. Hornthal was the owner in fee-simple of a brick building and lot in the town of Plymouth, in said county, which he contracted to sell to the defendant at the price of five thousand dollars, to be used as "a court-

house," to be paid for in five equal annual instalments of one thousand dollars each.

That on that day the defendant executed an obligation, in the following words and figures, to secure payment in part for the same, to wit:

"OFFICE OF THE BOARD OF COMMISSIONERS OF THE
"No. 19. COUNTY OF WASHINGTON, N. C.

"Twelve months after date, with interest from date at the rate of six per centum per annum, The Board of Commissioners of Washington County promise to pay to Louis M. Hornthal, or to
6 his order, one thousand dollars, for value received, and to secure indebtedness contracted for the necessary expenses of said county in the purchase of brick building for court-house.

"This first day of October, 1877.

"J. G. AUSBORN, [SEAL.]
"*Chairman of the Board of*
"*Commissioners of Washington County.*

"Countersigned:
"W. H. STUBBS,
"*Register of Deeds and Clerk of said Board.*"

III. That thereafter immediately the defendant took possession of said brick building, and has since continually held and used the same as the public court-house.

IV. That before the said bond became due and payable the holder, Louis M. Hornthal, endorsed the same to plaintiff for value.

V. That no part of the principal or interest of said bond has been paid.

VI. That payment of the same was demanded of defendant and refused before suit brought.

Wherefore plaintiff demands judgment against the defendant for one thousand dollars, with interest from 1 October, 1877, until paid, and costs of action.

(S'g'd) GILLIAM & GATLING,
Att'ys for Plaintiff.

(Endorsed:) Filed Nov. 15, 1879. N. J. Riddick, clerk.

7 And thereupon the defendants, the said Board of County Commissioners of Washington County, come and, by their attorneys, Latham & Skinner, answer as follows:

Answer.

Circuit Court of the United States, Eastern District of North Carolina.

EDWARD SALLINGER
vs.
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY.

The defendants, answering the complaint filed by the plaintiff against them in this action, say:

1. They admit that they are the Board of Commissioners of the

County of Washington, but what their rights and liabilities are as such are questions of law, which they submit to the judgment of the court.

2. They deny that on the first day of October, 1877, or on any other day previous to that time, Louis M. Hornthal was the owner in fee of the lot and building described in the complaint, or that he contracted to sell the same to the defendants to be used as a
8 court-house, and they deny that they ever issued the obligation declared on.

And, for further answer to this second allegation, the defendants say that on the 30th day of November, 1877, James F. Norman, for himself and the other tax-payers of the county of Washington (the said Norman being the Norman now chairman of the defendant Board of Commissioners), commenced an action against the Board of Commissioners of Washington County, J. E. Jackson, treasurer of said county; L. M. Hornthal, and L. H. Hornthal, involving the same facts as are involved in this case; that the complaint therein sets out all the facts in a full and ample manner; that the defendants believe the statements therein contained to be true, and they ask that said complaint, a copy of which is hereto attached, be considered as a part of their answer, as if the same was copied herein at length.

3. In addition to the matters set forth in said complaint, they insist that the former board had no right to issue said bond, because they had no authority from the General Assembly so to do, and that in so issuing said bond they acted *ultra vire*.

4. They deny the third allegation of the complaint, and say that they did not take possession and hold the premises as set forth,
9 but allege that they were already in possession by virtue of a lease, and continued so to hold until its expiration, and have only remained in possession since until the matter involved in the action hereinbefore referred to could be determined.

5. They deny the fourth allegation and say that Louis M. Hornthal did not endorse the said bond to the plaintiff for value; but, on the contrary, that after Louis M. Hornthal and the plaintiff had actual notice, and Louis M. Hornthal notice by publication, of the issuing of the restraining order in the action of James F. Norman ag'st The Board of Commissioners and others hereinbefore referred to, a copy of which restraining order is hereto attached and made part of this complaint, the said Louis M. Hornthal endorsed the same to the plaintiff without any consideration whatever, and for the purpose only of avoiding the force and effect of said restraining order.

6. That the said restraining order is still in force, being continued by consent of all parties.

7. They admit that no part of said bond has been paid and that payment has been demanded by one L. H. Hornthal, of
10 the county of Washington, who is the true owner, and they allege that said L. H. Hornthal obtained said bond to be issued to L. M. Hornthal, of New York, in order to give jurisdiction to the Federal courts.

Wherefore they ask that said bond be declared void and the action dismissed.

(S'g'd) LATHAM & SKINNER,
For Defendants.

And this cause is continued from term to term of said court until June term, 1881, thereof, when the plaintiff, by his attorneys aforesaid, Gilliam & Gatling, files the following reply:

Replication.

In the Circuit Court of the United States, Eastern District of North Carolina.

EDWARD SALLINGER
vs.
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY.

The plaintiff above named, for reply to the answer of the defendant, says:

That he never had any knowledge or information of any of
11 the matters alleged by defendant in defence to this action until long after he purchased the bonds issued by the predecessors of defendant.

That he had at that time never heard of any suit instituted or pending in the court of Washington county, North Carolina, at the instance of Jas. F. Norman in behalf of himself and other tax-payers of Washington county against the Board of Commissioners, J. E. Jackson, treasurer of Washington county; L. M. Hornthal and L. H. Hornthal, or between any other parties, or pending in any other suit touching the purchase of the property referred to in the answer, nor has he now any information on the subject except that contained in the defendant's answer, of the truth of which he demands strict proof. He had never heard the validity or *bona fides* of the bonds in any way questioned, nor had he ever heard any facts stated that induced him to question their validity until after he had purchased them.

Wherefore he demands judgment asked for in the complaint.

(S'g'd) GILLIAM & GATLING, *Att'ys.*

(Endorsed:) Filed June term, 1881. N. J. Riddick, clerk.

12 And this cause is continued, and thereafter be it remembered on the 2d day of November, 1881, Edward Sallinger, the plaintiff aforesaid, filed a bond and sued and prosecuted out of the circuit court of the United States for said district against the said Board of Commissioners of Washington County, citizens as aforesaid, a summons; which summons and bond are in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA, *Eastern District of North Carolina:*

Circuit Court, 4th Circuit.

EDWARD SALLINGER, Plaintiff,
against
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY, Defendant.

The President of the United States of America to the marshal of the eastern district of North Carolina, Greeting:

You are hereby commended to summon the Board of Commissioners of Washington County, a municipal corporation, a
13 citizen and resident of the eastern district of North Carolina, to appear before the judges of the circuit of the United States, at the next term of said court to be held for the district aforesaid, at Raleigh, on the last Monday in November, 1881, then and there to answer the complaint of Edward Sallinger, the plaintiff herein, citizen and resident of the State of New York, which complaint will be filed in said court within the first three days of said term; and let the said defendant take notice that if it fail to answer the said complaint within the time limited by law, the plaintiff will take judgment against it for the relief demanded in the complaint according to the regular course of the court.

Herein fail not, and have you then and there this summons.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Raleigh, in said district, the 2d day of November, 1881, and in the 107th year of the Independence of the United States.

[SEAL.] N. J. RIDDICK, *Clerk.*

14 *Prosecution Bond.*

Circuit Court, Fourth Circuit.

UNITED STATES OF AMERICA,
Eastern District of North Carolina:

EDWARD SALLINGER
against
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY.

Know all men by these presents, that we, L. H. Hornthal & L. Hornthal, as principals, and —— as suret—, are held and firmly bound unto the defendant in the above-entitled action in the sum of three hundred dollars, to the payment of which we bind ourselves firmly by these presents, sealed with our seals, and dated this 2 day of November, 1881.

The condition of the above obligation is such, that whereas the plaintiff in the above-named cause hath brought a civil action against the said defendant therein: Now, if the said plaintiff shall prosecute his said action with effect, or in case he fail therein, shall well and truly pay to the said defendant all such costs and damages

as shall be awarded and recovered against the said plaintiff, then the above obligation is to be void: otherwise to remain in full force and effect.

(S'g'd) L. H. HORNTHAL. [SEAL.]
" LOUIS HORNTHAL. [SEAL.]

Taken and acknowledged before me, this 18th day of November, 1881, as to L. H. Hornthal & L. Hornthal.

[L. S.] (S'g'd) SAM. W. LATHAM, *Clerk.*

15 And on the return day of said writ, on the last Monday in November, 1881, at the court-house in Raleigh, before the Honorable Geo. W. Brooks, judge of the United States court for the eastern district of North Carolina, present and holding said court, J. B. Hill, marshal of aforesaid district, returns said writ endorsed as follows:

"Received Nov. 14, 1881. Executed by delivering a copy of within summons to John W. Latham, chairman of Board of Commissioners of Washington County, this 18th day of November, 1881.

" J. B. HILL,
" *U. S. Marshal.*
" By D. SPRUILL,
" *Dep. Marshal.*

And thereupon the said Edward Sallinger comes and complains by his attorneys, Gilliam & Gatling, as follows:

Complaint.

In the Circuit Court.

THE UNITED STATES OF AMERICA,
Eastern District of North Carolina:

EDWARD SALLINGER, Plaintiff,
against
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY, Defendant.

The plaintiff above-named alleges:

16 I. That he is a citizen and resident of the State of New York.

II. That the defendant is a corporation formed and organized by the laws of North Carolina, in the eastern district of said State and within the jurisdiction of this court, and represents the county of Washington in its rights and responsibilities.

III. That on the first day of October, 1877, the defendant executed to L. M. Hornthal, four obligations in the following words and figures, to wit:

No. 20. Office of the Board of Commissioners of the County of Washington, N. C.

Two years after date, with interest from date, at the rate of six per centum per annum, The Board of Commissioners of Washington

County promise to pay Louis M. Hornthal, or his order, one thousand dollars for value received, and to secure indebtedness contracted for the necessary expenses of said county in the purchase of brick building for court-house. This first day of October, 1877.

J. G .AUSBORN, [SEAL.]

Chairman of the Board of Commissioners of Washington County.

[Seal of Washington County, N. C.]

Countersigned—

W. H. STUBBS,

Register of Deeds and Clerk of said Board.

Endorsed: Pay Ed. Sallinger or order. L. M. Hornthal.

17 No. 21. Office of the Board of Commissioners of the County of Washington, N. C

Three years after date, with interest from date, at the rate of six per centum per annum, The Board of Commissioners of Washington County promise to pay Louis M. Hornethal, or his order, one thousand dollars for value received, and to secure indebtedness contracted for the necessary expenses of said county in the purchase of brick building for court-house. This first day of October, 1877.

J. G. AUSBORN, [SEAL.]

Chairman of the Board of Commissioners of Washington County.

[Seal of Washington County, N. C.]

Countersigned:

W. H. STUBBS,

Register of Deeds and Clerk of said Board.

Endorsed: Pay Ed. Salinger or order. L. M. Hornthal.

No. 22. Office of the Board of Commissioners of the County of Washington, N. C.

Four years after date, with interest from date, at the rate of six per centum per annum, The Board of Commissioners of Washington County promise to pay to Louis M. Hornthal, or his order, one thousand dollars for value received and to secure indebtedness contracted for the necessary expenses of said county in the purchase of brick building for court-house. This first day of October, 1877.

J. G. AUSBORN, [SEAL.]

Chairman of the Board of Commissioners of Washington County.

[Seal of Washington County, N. C.]

Countersigned:

W. H. STUBBS,

Register of Deeds & Clerk of said Board.

Endorsed: Pay Ed. Sallinger or order. L. M. Hornthal.

18 No. 23. Office of the Board of Commissioners of Washington County, N. C.

Five years after date, with interest from date, at the rate of six

per centum per annum, The Board of Commissioners of Washington County promise to pay Louis M. Hornthal, or his order, one thousand dollars for value received, and to secure indebtedness contracted for the necessary expenses of said county in the purchase of brick building for court-house. This first day of October, 1877.

J. G. AUSBORN, [SEAL.]
Chairman of the Board of Commissioners of Washington County.

[Seal of Washington County, N. C.]

Countersigned:
W. H. STUBBS,
Register of Deeds & Clerk of said Board.

Endorsed: Pay Ed. Sallinger or order. L. M. Hornthall.

IIII. That before said bonds above described, or either of them, became due and payable the said Louis M. Hornthal endorsed the same to the plaintiff for value.

V. That no part of the principal or interest of said bonds has been paid.

VI. That payment of the same has been demanded of the defendant and refused before this action was instituted.

Wherefore the plaintiff demands judgment against the defendant for four thousand dollars, with interest, according to the
19 tenor of said bonds, until paid, and for costs of this action.

HINSDALE & DEVEREUX,
GILLIAM & GATLING,
Plaintiff's Attorneys.

(Endorsed:) Filed Nov. 26, 1881. N. J. Riddick, clerk.

And thereupon the following order is filed:

EDWARD SALLINGER
vs.
THE B'D OF COM'RS OF WASHINGTON CO. } No. 219.

EDWARD SALLINGER
vs.
THE B'D OF COM'RS OF WASHINGTON CO. } No. 260. App. Nov. Term, 1881.

It is ordered, by consent, that the above-entitled actions, involving in all respects similar causes of action, be consolidated.

HINSDALE & DEVEREUX,
Att'ys for Pl'ff.
FOULE & BUSBEE, *For Def'ts.*

(Endorsed:) Consent. Order of consolidation with No. 260. Filed Dec. 8, 1881. N. J. Riddick, clerk.

20 And thereupon the said Edward Sallinger comes, and by his attorneys, Hinsdale & Devereux, and Gilliam & Gatling, files an amended complaint in the words and figures, to wit:

Amended Complaint.

THE UNITED STATES OF AMERICA, *State of North Carolina:*

In the Circuit Court of the U. S. for the Eastern District of North Carolina. November Term, 1881.

EDWARD SALLINGER, Plaintiff,
against
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY, N. C., Defendant.

The plaintiff above named alleges—

I. That he is a citizen and resident of the State of New York.

II. That the defendant is a corporation, formed and organized by the laws of North Carolina, in the eastern district of said State, and within the jurisdiction of this court, and represents the county of Washington in its rights and responsibilities.

III*a*. That on the first day of October, 1877, the defendant executed to L. M. Hornthal five obligations in the following words and figures, to wit:

21 *b*No. 19. Office of Board of Commissioners of the County of Washington, N. C.

Twelve months after date, with interest from date at the rate of six per cent. per annum, The Board of Commissioners of Washington County promise to pay to Louis M. Hornthal, or his order, one thousand dollars, for value received, and to secure indebtedness contracted for the necessary expenses of said county in the purchase of brick building for court-house. This first day of October, 1877.

J. G. AUSBORNE, [SEAL.]
Chairman of the Board of Commissioners of Washington County.

Countersigned—
[Seal of Washington County, N. C.]

W. H. STUBBS,
Register of Deed- and Clerk of said Board.

Endorsed: Pay Ed. Sallinger, or order. L. M. Hornthal.

*c*No. 20. Office of Board of Commissioners of the County of Washington, N. C.

Two years after date, with interest from date at the rate of six per centum per annum, The Board of Commissioners of Washington County promise to pay to Louis M. Hornthal, or his order, one thousand dollars, for value received, and to secure indebtedness contracted for the necessary expenses of said county in the purchase of brick building for court-house. This first day of October, 1877.

J. G. AUSBORNE, [SEAL.]
Chairman of the Board of Commissioners of Washington County.

Countersigned—
[Seal of Washington County, N. C.]

W. H. STUBBS,
Register of Deeds and Clerk of said Board.

Endorsed: Pay Ed. Sallinger, or order. L. M. Hornthal.

22 *d*No. 21. Office of Board of Commissioners of the County of Washington, N. C.

Three years after date, with interest from date at the rate of six per centum per annum, The Board of Commissioners of Washington County promise to pay Louis M. Hornthal, or his order, one thousand dollars, for value received, and to secure indebtedness contracted for the necessary expenses of said county in the purchase of brick building for court-house. This first day of October, 1877.

J. G. AUSBORNE, [SEAL.]

Chairman of the Board of Commissioners of Washington County.

Countersigned—

[Seal of Washington County, N. C.]

W. H. STUBBS,

Register of Deed- and Clerk of said Board.

Endorsed: Pay Ed. Sallinger, or order. L. M. Hornthal.

No. 22. Office of Board of Commissioners of the County of Washington, N. C.

Four years after date, with interest from date at the rate of six per centum per annum, The Board of Commissioners of Washington County promise to pay Louis M. Hornthal, or his order, one thousand dollars, for value received, and to secure indebtedness contracted for the necessary expenses of said county in the purchase of brick building for court-house. This first day of October, 1877.

J. G. AUSBORNE, [SEAL.]

Chairman of the Board of Commissioners of Washington County.

Countersigned—

[Seal of Washington County, N. C.]

W. H. STUBBS,

Register of Deeds and Clerk af said Board.

Endorsed: Pay Ed. Sallinger, or order. L. M. Hornthal.

23 *f*No. 23. Office of Board of Commissioners of the County of Washington, N. C.

Four years after date, with interest from date at the rate of six per centum per annum, The Board of Commissioners of Washington County promise to pay to Louis M. Hornthal, or his order, one thousand dollars, for value received, and to secure indebtedness contracted for the necessary expenses of said county in the purchase of brick building for court-house. This first day of October, 1877.

J. G. AUSBORNE, [SEAL.]

Chairman of the Board of Commissioners of Washington County.

Countersigned—

[Seal of Washington County, N. C.]

W. H. STUBBS,

Register of Deeds and Clerk of said Board.

Endorsed: Pay Ed. Sallinger, or order. L. M. Hornthal.

IV. That each and every of the above-recited bonds was due and payable on or before the first day of October, 1881, and before this action was brought, with interest thereon from the date thereof.

V. That no part of the principal or interest of said bonds has been paid.

VI. That before said bonds, or either of them, became due and payable the said Louis M. Hornthal endorsed the same to the plaintiff for value.

VII. That the said bonds have been duly presented to the
24 treasurer of the county of Washington and to the defendants, and payment duly demanded and refused before this action was instituted; of all of which the defendant was duly notified.

VIII. That the plaintiff has no other remedy to enforce the collection of said bonds except by mandamus.

Wherefore the plaintiff demands judgment against the defendant—

First, for five thousand dollars, with interest, according to the tenor of said bonds, until paid, and for costs of this action; and that a peremptory writ of mandamus issue to the defendants, commanding them that they levy and cause to be collected a sum sufficient to satisfy said judgment, interest, and costs of collection, and that, when collected, they apply the same to its satisfaction.

HINSDALE & DEVEREUX,
GILLIAM & GATLING,
Plaintiffs' Attorneys.

NORTH CAROLINA, *Wake County:*

H. A. Gilliam, being duly sworn, says: That the facts set forth in paragraph I, II, III, *a*, *b*, *c*, *d*, *e*, IV, V, VI, VII, VIII are true except as to matters therein stated on information and belief, and as to those matters he believes it to be true; that he is the plaintiff's
att'y, and has possession of the bonds sued upon; that
25 he derives his information from said bonds and from the statements and complaint of plaintiff and his agent; that the plaintiff is a non-resident of North Carolina.

(S'g'd) H. A. GILLIAM.

Subscribed and sworn to before me this 8th day of December, 1881.

N. J. RIDDICK, *Clerk.*

(Endorsed:) Filed this 8th day of December, 1881. N. J. Riddick, clerk.

Whereupon the defendants come, and by their attorneys, Fowle, Reade, Busbee & Busbee, file the following answer:

Answer.

In the Circuit Court of the United States, 4th Circuit, Eastern Dist' of North Carolina.

EDWARD SALLINGER, Plaintiff,
against
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY, Defendants.

The defendants, answering the complaint herein, say—

I. That they admit the allegations contained in the first section of the complaint.

II. That they admit that they are The Board of Commissioners of Washington County, but what their rights and liabilities are as such are questions of law which they submit to the judgment of the court.

26

III. That the allegations contained in the third section of the complaint are not true.

IV. That the allegations contained in the fourth section of the complaint are not true.

Further answering, defendants say—

V. That they deny that on the first day of October, 1877, or on any other day previous to that time, Louis M. Hornthal was the owner in fee of the property described in the bonds set out in the complaint, or that he contracted to sell the same to the defendants to be used as a court-house, and defendants deny that they issued the said bonds.

VI. That the execution and issuance of said bonds by the former board of commissioners of said county was *ultra vires*, and defendants say that the same are invalid and void; that the statutory regulations governing such matters were not complied with; that the action of said commissioners was not had at the regular September meeting of the board, nor by the unanimous vote of the members of the board, nor upon notice as provided by law, and that said action was taken without the concurrence of a majority of the justices of the peace of said county sitting with said board as required by law.

27

VII. That on the 30th day of November, 1877, James F. Norman, for himself and the other taxpayers of said county, commenced an action against the Board of Commissioners of said county, J. E. Jackson, county treasurer, L. M. Hornthal and L. H. Hornthal, wherein the same matters were involved as are involved in this action; that the complaint therein sets out all the facts, and defendant ask that said complaint—a copy whereof is hereto attached—may be taken as part of this answer as if thes ame were herein set out at length; that the restraining order set out in said action is still in force, and has so continued since the date when it was issued, the 30th November, 1877.

Wherefore defendants ask that they be hence dismissed with their costs, &c.

FOWLE, READE,
BUSBEE & BUSBEE,
Att'ys for Def'ts.

28 EXHIBIT "A."

Superior Court.

WASHINGTON COUNTY:

JAMES F. NORMAN, on behalf of himself and the other taxpayers of Washington County,

against

THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY, J. E. JACKSON, Treasurer of Washington County, L. M. Hornthal, L. Hornthal.

The plaintiff, on behalf of himself and the other taxpayers of the county of Washington, complains:

I. That in the month of May, 1873, the court-house and jail of said county were located on a certain lot in the town of Plymouth, lying on Main or Second street, numbered and known in the plan of said town as lot number one hundred and fifteen.

II. That the said lot was duly designated as the site of the court-house and jail of said county, according to the provisions of law, and had so continued to be for more than half a century, and the title to said lot in fee was then and is now in the Board of Commissioners of said county.

29 III. That in the said month and year the court-house was burned, and thereafter court was held in a certain building situated on Water street, in the said town, on a lot numbered and known as the water part of lot numbered one hundred and forty-nine, but that such removal was intended to be merely temporary, and was made without notice, not at the regular September meeting and not by the unanimous vote of the Board of County Commissioners then being.

IV. That the jail is now standing upon the said lot numbered one hundred and fifteen, and is now used, and has always been used, for the purposes for which it was built.

V. That the building in lot number one hundred and forty-nine is an old storehouse, the lower story of which has been for many years used for the storage of salt; that by the action of salt so stored therein the brick walls of the building have been rotted away and are insecure and dangerous to life: that said building is in every way unfit for a court-house, and cannot be so used without many

30 and expensive repairs and alterations, and is not, at a fair valuation, worth more than two thousand and five hundred dollars.

VI. That on the first Monday in October, 1877, the defendant, Board of Commissioners of said county, met and adopted the following order or resolution by a majority vote of the said board:

"Moved and seconded that a vote of the board be taken on the purchase of the brick building now used as a court-house; whereupon three votes were cast for to purchase said building and one vote was cast against the purchase of said building."

VII. That, as the plaintiff is informed and believes, the said Board of Commissioners thereupon adjourned without making or ordering

any further order to be made on the minutes of their proceedings and without taking any further action as regards the purchase of said building.

VIII. That, nevertheless, there appears upon the minutes of said meeting the following order:

Whereas the court-house of the county of Washington, with the offices, for the preservation of the public records, and for the
31 transaction of the public business, were destroyed by fire in the month of May, 1873, and it is absolutely necessary that the county shall own a court-house, with suitable offices, wherein the public records may be safely kept, and wherein the officers of the court, and of the county, can conveniently transact the public business, and this board declare that it is inexpedient longer to occupy a rented house for that purpose; and whereas Louis M. Hornthal, of the city of New York has offered to sell to this Board of Commissioners for said county the water part of lot number one hundred and forty-nine, situated in the town of Plymouth, in said county, so numbered upon the plat or plan of said town, known as the custom-house property, fronting 50 feet upon water street and extending to the river, including the wharf upon the same, with the brick house, 40 feet wide, 60 feet long, of three stories in height, with basement or cellar, at the price of $5,000, to be secured by the bonds of the commissioners, payable in five equal annual instalments, bearing interest at the rate of six per cent. per annum, and agrees to execute title to the same upon payment of the pur-
32 chase-money and interest, and to execute to this board a bond, with surety, to perform this agreement; and whereas a majority of the justices of said county have, in writing, directed the Board of County Commissioners to accept the offer of the said L. M. Hornthal, and to make the purchase of the said property upon the terms named:

It is ordered by this board, a majority of the said justices concurring, that Jos. G. Ausborn, chairman of this board, contract with the said L. M. Hornthal, through his agent, L. H. Hornthal, the purchase of said property; that he take from the said L. M. Hornthal his bonds, with surety, as above provided; and that he execute, as chairman of this board, five bonds, each for $1,000, payable severally 1st Octo., 1878, 1879, 1880, 1881, 1882, bearing six per cent. interest; that he cause the same to be countersigned by the clerk of this board, who is register of deeds for this county, and that the seal of the office be attached.

IX. That the plaintiff is informed, believes, and charges that the order or resolution so above set forth was never read to the Board of Commissioners at any of their meetings; and was never by them adopted; and that if the same was adopted, it was not done
33 by a unanimous vote of the board.

X. That the said order or resolution was not adopted at the regular September meeting of said board.

XI. That the said order or resolution amounted, in fact, to a removal of court-house from lot number one hundred and fifteen to the water part of lot number one hundred and forty-nine, a dis-

tance of about three hundred yards, and that no notice of such proposed change was ever given as required by law.

XII. That the building on the water part of lot number one hundred and forty-nine, for the reasons hereinbefore stated, is entirely unfit for the purposes for which the commissioners propose to purchase it; and, further, that it is closely and entirely surrounded by buildings on three sides, rendering it very unsafe on account of fire, and making the premium for insurance exceedingly heavy, and that if the public documents and records were therein deposited they would be by no means safe.

XIII. That the jail on lot number one hundred and fifteen is a very costly one, but is entirely unsuited to any other purpose,
34 and cannot be sold for anything like its value; that if the court-house site is removed from said lot there is no place or room on the water part of lot number one hundred and forty-nine in which another jail can be erected, and prisoners will always have to be carried along the most public streets of the town, a distance of three hundred yards, necessitating guards and other great expenses to the tax-payers of said county.

XIV. That a building of brick in all respects suitable and proper for a court-house can be erected on lot number one hundred and fifteen at a cost less than $5,000, and upon more favorable terms than those on which the defendants propose to buy of the said Hornthal.

XV. That, notwithstanding the premises, the defendant, Board of Commissioners, or a majority of them, propose to carry out the order or resolution purporting to have been adopted by them in regard to said purchase of water part of lot number one hundred and forty-nine; and the chairman of said board proposes to issue, or has already issued, five one-thousand-dollar bonds, according to the terms of said order.

35 XVI. The *the* other defendants are the treasurer of said county and L. M. & L. H. Hornthal.

XVII. That the plaintiff is informed and believes the lot or building on water part of lot one hundred and forty-nine is in fact the property of L. H. Hornthal, who has negotiated the sale of the same on his own account; and that if the bonds have already been issued they are now in his possession.

XVIII. That the plaintiff is a resident and tax-payer of said county and the owner of real estate therein.

XIX. That the plaintiff has issued a summons against the defendants, returnable to the next term of the superior court of Washington county.

XX. That if the defendant, Board of Commissioners, is permitted to issue said bonds, and the defendants, the treasurer, to pay them, the injury to the plaintiff will be irreparable.

Wherefore the plaintiff, on behalf of himself and the other tax-payers of said county, prays judgment—

I. That an injunction issue, directed to the defendants, enjoining the defendant, Board of Commissioners, from removing the site
36 of the court-house of said county from lot No. 115 or expending any public monies on the repair of the building on the

water part of lot No. 149, under the orders and proceedings heretofore by them had and made, and enjoining them from executing and issuing any county bonds or bond in payment of the building on said lot No. 149 under said orders and proceedings, and enjoining them from levying or collecting any taxes for the purpose of paying said bonds whether now issued or not; and enjoining the defendants, the treasurer of said county, J. E. Jackson, from paying any bonds or bond issued or that may be issued for any such purpose, under any proceedings heretofore had before the defendants, Board of Commissioners; and enjoining the defendants L. H. Hornthal and L. M. Hornthal from selling, transferring, or negotiating any of said bonds, or sending them beyond the jurisdiction of this court.

II. That said bonds, if already issued, be declared null and void and of no effect, and that the same be delivered up by the said L. H. Hornthal and L. M. Hornthal to be cancelled.

III. For such other and further relief as the plaintiff may be entitled to.

37 IV. And for costs.

(S'g'd) LATHAM,
Att'y for Pl'ffs.

James F. Norman, the plaintiff, being duly sworn, deposes and says: That the facts set forth in the foregoing complaint are true of his own knowledge except as to those matters stated on information and belief, and as to those matters he believes said complaint to be true.

J. F. NORMAN.

Sworn and subscribed to before me the 23d day November, 1877.
J. A. MELSON, *Clerk.*

38 WASHINGTON COUNTY:

Superior Court.

JAMES F. NORMAN, on behalf of himself and the other Tax-payers of Washington County,
against
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY, J. E. JACKSON, Treasurer of Washington County, L. H. and L. M. Hornthal.

At a superior court began and held for the county of Washington on the 12th Monday after the 4th Monday in August, 1877—present, his Honor R. H. Cannon, judge presiding—on reading and filing the complaint verified by the oath of the plaintiff, and it appearing to the satisfaction of the court that an injunction ought to be issued, it is now, on motion of L. C. Latham, attorney for the plaintiffs, ordered that upon the plaintiffs filing with the clerk of Washington superior court a written undertaking, with sufficient sureties, in the sum of one thousand dollars, to be justified before and
39 approved by the said clerk, to the effect that the plaintiff will pay to the defendants such damages, not exceeding the said

sum of five hundred dollars, as they may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto, the said clerk shall at once issue an order directed to the defendants, enjoining the defendant Board of Commissioners from removing the site of the court-house of said county from lot No. 115, in the town of Plymouth, or expending any public monies on the repair of the building on lot No. 149, under the orders and proceedings heretofore by them had and made; and enjoining them from executing and issuing any county bonds or bond in payment of the building on said lot No. 149 under said orders and proceedings; and enjoining them from the levying or collecting any taxes for the purpose of paying said bonds, whether now issued or not; and enjoining the defendants, the treasurer of said county, J. E. Jackson, from paying any bond or bonds issued, or that may be issued, for any such purpose, under any proceedings heretofore had before the defendant Board of Commissioners; and enjoining the defendants, L. H. & L. M. Hornthal, from selling, transferring,
40 or negotiating any of said bonds, or sending them beyond the jurisdiction of this court.

R. H. CANNON, *Judge.*

WASHINGTON COUNTY:

Superior Court.

JAMES F. NORMAN, on behalf of himself and the other Taxpayers of Washington County

against

THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY, J. E. JACKSON, Treasurer of Washington County; L. H. Hornthal, and L. M. Hornthal.

Whereas the plaintiff has applied for an injunction restraining the defendant Board of Commissioners from removing the site of the court-house of said county from lot No. 115, in the town of Plymouth, or expending any public monies on the repair of the building on lot No. 149 under the orders and proceedings heretofore by them had and made, and enjoining them from executing and issuing any county bond in payment of the building on lot No. 149 under said orders and proceedings; and enjoining them from
41 the levying or collecting any taxes for the purpose of paying any such bonds; and enjoining the defendants, the treasurer of said county, J. E. Jackson, from paying any bonds or bond issued for any such purpose under the proceedings heretofore had before the defendant Board of Commissioners, and enjoining the defendants, L. H. Hornthal and L. M. Hornthal, from selling, transferring, or negotiating any of said bonds, or sending them beyond the jurisdiction of this court:

Now, therefore, we undertake in the sum of one thousand dollars to pay to the said defendants such damages as they may sustain by reason of such injunction, if the court shall finally decide that the plaintiff is not entitled thereto.

J. F. NORMAN. [SEAL.]
J. P. NEWBURY. [SEAL.]

J. F. Norman and J. P. Newberry, being duly sworn, severally say, each for himself, that he is a householder and freeholder in Washington county, and that each of them is worth one thousand dollars over all his debts and liabilities, and exclusive of his
42 homestead and personal property exemptions.

J. F. NORMAN.
J. P. NEWBERRY.

Sworn before me, the 30th day of Nov.. 1877.

J. A. MELSON, *Clk.*

This bond is approved by me.

WASHINGTON COUNTY:

Superior Court.

JAMES F. NORMAN. on behalf of himself and other Tax-payers of Washington County,

against

THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY, J. E. Jackson, the Treasurer of Washington County; L. M. Hornthal, and L. H. Hornthal.

The State of North Carolina to the Board of Commissioners of Washington County, J. E. Jackson, treasurer of Washington county; L. M. Hornthal, and L. H. Hornthal, their counsellors, attorneys, solicitors, and agents:

43 Whereas James F. Norman, on behalf of himself and the other tax-payers of Washington county, has filed his complaint in the superior court of Washington county against you, the said Board of Commissioners of Washington County, J. E. Jackson, treasurer of Washington county; L. M. Hornthal, and L. H. Hornthal, and it was thereupon ordered by his honor R. H. Cannon, judge presiding, that an injunction should be issued against you and the other persons aforesaid, enjoining you, the defendant Board of Commissioners of Washington County, from removing the site of the court-house of said county from lot No. 115, in the town of Plymouth, or expending any public monies on the repair on lot No. 149, under the orders and proceedings by them heretofore had and made, and enjoining you, the said Board of Commissioners, from executing and issuing any county bonds or bond in payment of the building on said lot No. 149, under said orders and proceedings, and enjoining you, the said Board of Commissioners, from levying or collecting any taxes for the purpose of paying said bonds, whether now issued or not, and enjoining you, J. E. Jackson, treasurer
44 of said county, from paying any bond or bonds issued, or that may be issued, for any such purpose, under any proceedings heretofore had before the defendant Board of Commissioners, and enjoining you L. M. and L. H. Hornthal from selling, transferring, or negotiating any of said bonds, or sending them beyond the jurisdiction of this court.

We, therefore, strictly enjoin and command you, the Board of Com-

missioners of Washington county, to desist from removing the site of the court-house of said county from lot No. 115, in the town of Plymouth, or expending any public monies on the repair of the building on lot No. 149, under the orders and proceedings heretofore by them had and made, and from executing and issuing any county bond or bonds in payment of the building on said lot No. 149 under said orders and proceedings, and from levying or collecting any taxes for the purpose of paying said bonds or bond, whether now issued or not, and you, J. E. Jackson, treasurer of said county, from paying any bond or bonds issued or that may be issued for any such purpose, under any proceedings heretofore had before the defendant, Board of Commissioners, and you, L. M. & L. H.
45 Hornthal, from selling, transferring, or negotiating any of said bonds or sending them beyond the jurisdiction of this court.

Witness, J. A. Melson, clerk of the superior court for Washington Co., at office in Plymouth, 30th day of November, A. D. 1877.

J. A. MELSON, *Clk.*

46 And now, at the November term, 1881, of said court, the following jurors, to wit: C. H. Clark, Thomas Johns, L. L. Doub, J. S. Brassfield, W. H. Whitaker, W. H. Utley, Frank Thomas, H. B. Jordan, John Price, J. H. Blalock, Sampson Anderson, and A. R. Edwards, being chosen, tried, and sworn, and having found all of said issues in favor of the plaintiff and assessed his damages at six thousand two hundred and forty-seven & $\frac{50}{100}$ dollars, a judgment is rendered by his honor Geo. W. Brooks, judge presiding, in the words and figures following, to wit:

Judgment.

THE UNITED STATES OF AMERICA,
State of North Carolina:

In the Circuit Court of the United States for the Eastern District of North Carolina. November Term, 1881.

EDWARD SALLINGER, Plaintiff,
against
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY, Def't.

By agreement of parties this action is tried at the appearance term.

47 The issues in this action having been brought on for trial before his honor George W. Brooks and a jury, at a court held on the last Monday in November, 1881, and the issues having been tried and a verdict for the plaintiff having been duly rendered on the 8th day of December, 1881:

Now, on motion of Gilliam & Gatling, and Hinsdale & Devereux, attorneys for the plaintiff, it is adjudged that the plaintiff recover of said defendant six thousand two hundred and forty-seven and $\frac{50}{100}$, dollars ($6,247.50), with interest on five thousand dollars ($5,000) from November 28th, 1881, till paid, and the costs of this action to be taxed by the clerk.

And it is further adjudged that a peremptory writ of mandamus do issue out of and under the seal of this court, directed to the defendants and commanding them that they forthwith pay the said judgment, principal, interest and costs out of such funds as may be in the treasury of said county on hand, then that the said defendants proceed forthwith, as soon as authorized by law, to levy, and cause to be collected, a tax for and sufficient to pay the same
48 and out of said tax when collected, that the defendants pay off and discharge the said judgment.

G. W. BROOKS,
District Judge.

Endorsed: Filed 8th of December, 1881. N. J. Riddick, clerk.

Bill of Exceptions.

Circuit Court of the United States, for the Fourth Circuit and Eastern District of North Carolina.

EDWARD SALLINGER, Plaintiff,
against
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY, Defendants,

Be it remembered that upon the trial of the issues joined between the above-named parties, at a court held for the fourth circuit and eastern district of North Carolina, at the Federal court-house, in the city of Raleigh, on the last Monday in November, 1881, before the Honorable George W. Brooks, United States district judge, the plaintiff put in evidence, without objection by the defendant, and proved the execution of the bonds declared upon, a copy
49 of the first of which is hereto appended and made a part hereof, and offered in evidence the deposition of Edward Sallinger, the plaintiff, by which it was shown that the bonds were endorsed to the plaintiff for value by Lewis M. Hornthal, the obligee, on the 26th day of April, 1878, and without notice of any defence thereto, there being no evidence to the contrary.

The defendants offered in evidence the exhibit accompanying the answer marked "A," which was objected to by the plaintiff and excluded by the court.

Exception 1. The defendant's counsel excepted.

The defendants offered in evidence the paper marked "B," hereto annexed, purporting to be the proceedings of the Board of Commissioners of Washington County, to show that the action of said board in executing and issuing the said bonds was *ultra vires*, in that the statutes regulating such matters had not been observed or complied with, in that the action of the Board of Commissioners had not been had at the regular September meeting of the board, nor by the unanimous vote of the said board, nor upon notice, as provided in Bartle's Revisal, chapter 27, sec. 8, sub. sec. 8; and further, that
50 the commissioners had no power to purchase real property without the concurrence of a majority of the justices of Washington county, under the provisions of chap. 141, sec. 5, laws of 1876–'7.

The plaintiff objected to receiving this paper in evidence. Objection overruled, and paper admitted.

It was further in evidence that the court-house of Washington county was destroyed by fire in the spring of 1872.

That in August following the defendants rented the building, for the purchase of which these bonds were issued, which is situated about 200 yards from the court-house which was destroyed by fire, in the town of Plymouth, and before the succeeding fall term of the superior court, the defendant gave notice, by public advertisement for 30 days, declaring the house so rented to be the public court-house of Washington county, and that courts were held continuously therein until the commencement of this action.

It was further in evidence that the paper on page 1 of Exhibit "13," dated Sept. 24, 1877, was signed by a majority of the justices of Washington county. The defendant asked the court to instruct the jury that upon this proof, the purchase by the Board of
51 Commissioners of this building from L. M. Hornthal was *ultra vires;* that the contract of purchase was void, and that the plaintiff could not recover.

Exception 2nd. The court declined to so charge and the defendants excepted.

There was no evidence offered by the defendant to show a failure of consideration by reason of a want of title with respect to the land for which the bonds were given, and no point was made on the trial by the defendant as to such alleged failure of consideration. For the purposes of said trial that defence was waived by the derendant.

The court directed the jury that upon the evidence the plaintiff was entitled to recover.

Exception 3rd. The defendant excepted.

HINSDALE & DEVEREUX,
Pl'ff's Attorneys.
READE, BUSBEE & BUSBEE,
Def't's Attorneys.

The foregoing bill of exceptions is approved. Judge Brooks having died before he could sign the exceptions in this case, which he heard sitting alone, knowing them to be right, and at the request of counsel, I have signed them in his stead.

(Signed) HUGH L. BOND, *A. Judge.*

52 Office of Board of Commissioners of the County of Washington, N. C.

No. 19. Twelve months after date, with interest from date at the rate of six per centum per annum, the Board of Commissioners of Washington County promise to pay Louis M. Hornthal or his order one thousand dollars for value received, and to secure indebtedness

contracted for the necessary expenses of said county in the purchase of brick building for court-house, this first day of October, 1877.

J. G. AUSBORN, [SEAL.]
Chairman of the Board of Commissioners of Washington County.

Countersigned—

[Seal of Washington County, N. C.]

W. H. STUBBS,
Register of Deeds and Clerk of said Book.

Endorsed: Pay Ed. Sallinger or order. L. M. Hornthal.

[Written across the face:] Judgment. U. S. circuit court. November Term, 1881. No. 260. T. D.

53 "B."

Special Meeting of the Board of County Commissioners, 1st Monday in October, 1877.

STATE OF NORTH CAROLINA, *Washington County:*

Board met according to adjournment.

Present: J. G. Ausborn, Thos. O. Vail, E. H. Leary, L. W. Ambrose, Geo. McDonald.

Minutes of last meeting read and approved.

To the honorable Board of Commissioners of Washington County:

The undersigned justices of the peace for Washington county respectfully ask that your body will at your next meeting contract with L. M. Hornthal in person, or by his agent, L. H. Hornthal, for the purchase of the brick store and lot in Plymouth, lately the custom-house, for the use of the county of Washington for a court-house, paying for the same the bonds of the county, bearing six per cent. interest, payable at one, two, three, four, and five
54 years, with interest from date, at price of five thousand dollars, or five bonds of one thousand dollars each, at the rate of interest due as aforesaid, as we have here reconsidered.

Plymouth, N. C., September 24th, 1877.

(Signed) BRYANT BENNETT, *J. P.*
" WM. R. CHESSON, *J. P.*
" L. M. PHELPS, *J. P.*
" ALEX. ARMSTRONG, *J. P.*
" JULIUS L. HOWELL, *J. P.*
" JOSEPHUS H. SNELL, *J. P.*
" JOSHUA B. DAVENPORT, *J. P.*
" D. SPRUILL, *J. P.*

Moved and seconded that a vote of the board be taken on the purchase of the brick building now used as a court-house.

Whereupon three votes were cast for to purchase said building (and one vote was cast against the purchase of said building).

Whereas the court-house of the county of Washington, with the offices for the preservation of the public records and for the transac-

tion of the public business, were destroyed by fire in the
55 month of May, 1873, and it is absolutely necessary that the county shall own a court-house, with suitable offices, wherein the public records may be safely kept, and wherein the officers of the court and of the county can conveniently transact the public business, and this board declare that it is inexpedient longer to occupy a rented house for these purposes; and whereas Louis M. Hornthal, of the city of New York, has offered to sell to this Board of Commissioners for said county the water part of lot number one hundred and forty-nine, situated in the town of Plymouth, in said county, so numbered upon the plot or plan of said town, known as the custom-house property, fronting fifty feet upon water street and extending to the river, including the wharf upon the same, with the brick house, forty feet wide, sixty feet long, of three stories in height, with basement or cellar, at the price of five thousand dollars, to be secured by the bonds of the Board of Commissioners, payable in five equal annual instalments, bearing interest at the rate of 6 per centum per annum, and agree to execute title to the same upon payment of the purchase-money and interest and to execute to this board a bond with surety to perform this agreement;
56 and whereas a majority of the justices of said county have, in writing, directed this Board of County Commissioners to accept the offer of the said L. M. Hornthal and make the purchase of the said property upon the terms named:

It is ordered by this board, a majority of said justices concurring, that Jas. G. Ausbon, chairman of this board, contract with the said L. M. Hornthal, through his agent, L. H. Hornthal, for the purchase of said property; that he take from the said L. M. Hornthal his bond with surety, as above provided, and that he execute, as chairman of this board, five bonds, each for one thousand dollars, payable severally 1st October, 1878, 1879, 1880, 1881, 1882, bearing 6 per centum interest; that he cause the same to be countersigned by the clerk of this board, who is the register of deeds for this county, and that the seal of his office be attached.

(Signed) J. G. AUSBON, *Chairman.*

57 *Special Meeting of the Board of County Commissoners, 1st Monday, Nov. 5, 1877.*

STATE OF NORTH CAROLINA, *Washington County:*

Board met according to adjournment.

Present: J. G. Ausbon, "ch'm;" Thos. O. Vail, Geo. McDonald, E. H. Leary, L. W. Ambrose.

Minutes of last meeting read and approved.

The undersigned, chairman of this board of County Commissioners, respectfully reports:

That in obedience to the order of this board, proposed on the 1st day of October, 1877, he accepted the bond of L. M. Hornthal, of the city of New York, in the penal sum of ten thousand dollars, with justied security, conditioned to execute title to this Board of County Commissioners for the brick store and lot in Plymouth,

known as the custom-house, upon payment of the purchase-
58 money, and that under said order he executed to him five bonds, each for one thousand dollars, dated the 1st day of October, 1877, bearing six per cent. interest from date, payable at one, two, three, four, and five years from date, which were countersigned by the clerk of this board and sealed with the seal of his office, as register of deeds, and that he has caused the said title bond to be proved and registered.

Respectfully submitted.

(S'g'd) J. G. AUSBON, *Chairman.*

The chairman of this board having reported his action in relation to the purchase of the brick store, known as the custom-house, for use as a court-house, and his execution of five county bonds for the purchase-money:

Therefore it is ordered that his report be adopted, and that his action in the premises be in all respects confirmed and approved.

(S'g'd) L. W. AMBROSE.
E. H. LEARY.
GEO. McDONALD.

59 And afterwards, to wit, on the 7th day of June, 1883, a petition for writ of error was filed in the clerk's office of said court, which, with the order of the court thereon, is in the words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of North Carolina.

EDWARD SALLINGER
vs.
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY.

To the hon. the judges of said court:

The petition of the defendants in the above-entitled cause respectfully represents that they feel aggrieved by the judgment of the said circuit court rendered against them at the November, 1881, term thereof, and to the end that the same may be reviewed and justice done they pray a writ of error to the next term of the Supreme Court of the United States, and herewith tender an appeal bond in conformity with the statute.

(Signed) BOARD OF COMMISSIONERS OF WASHINGTON COUNTY,
By READE, BUSBEE & BUSBEE, *Attorneys.*

Upon the filing of the above petition, together with the
60 appeal bond herein, the clerk of said circuit court will issue the writ of error as prayed, returnable to the next term of the Supreme Court of the United States.

(S'g'd) HUGH L. BOND,
Judge U. S. Circuit Court for Eastern District of North Carolina.

(Endorsed:) Filed June 7th, 1883. N. J. Riddick, clerk.

And thereupon an appeal bond was filed in the clerk's office of said court, which is in the words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of North Carolina.

EDWARD SALLINGER, Plaintiff,
vs.
THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY, Defendants.

Know all men by these presents, that we, John W. Latham, James F. Norman, and Benj. F. Owens are held and firmly bound unto Edward Sallinger in the sum of five hundred dollars, to be paid to the said Edward Sallinger, his executors or administrators; to which payment, well and truly to be made, we bind
61 ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated the 28th day of August, 1882.

The condition of the above obligation is such that, whereas The Board of Commissioners of Washington County have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment in the above-entitled suit by the circuit court of the United States for the eastern district of North Carolina.

Now, therefore, if the above-named Board of Commissioners of Washington County shall prosecute their said writ of error with effect and answer all damages and costs; if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(S'g'd) JNO. W. LATHAM, [SEAL.]
Ch'm B'd Co. Com's.
J. F. NORMAN. [SEAL.]
B. F. OWENS. [SEAL.]

WASHINGTON COUNTY, *ss:*

On the 28th day of August, 1882, before the undersigned, notary public for Washington county, personally appeared John W. Latham, James F. Norman, and Benjamin F. Owens, to me known to be the persons who executed the foregoing bond, and did severally
62 personally acknowledge that he did execute the same. And the said John W. Latham, J. F. Norman, and B. F. Owens, being duly sworn, say each for himself that he is a resident and freeholder in Washington county, N. C., and worth double the amount of the foregoing bond, exclusive of property exempt from execution and over and above all liabilities.

Witness my hand and seal of office hereto affixed.

[SEAL.] (S'g'd) ROB'T S. GORLET,
Notary Public for Washingtan County.

I approve the above bond.

(Signed) HUGH T. BOND,
Circuit Judge.

Whereupon the following writ of error was issued:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the eastern district of North Carolina, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Edward Sallinger and The Board of Commis-
63 sioners of the County of Washington, a manifest error hath happened to the great damage of the said Board of Commissioners of the county of Washington, as by their complaint appears; we, being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 8th day of October, A. D. 1883, in the Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the 7th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal of the United States Circuit Court, Eastern District of N. C.]

N. J. RIDDICK,
Clerk U. S. Circuit Court, Eastern District of North Carolina.

64 UNITED STATES OF AMERICA, *ss:*

To Edward Sallinger, or his attorneys of record, Messrs. Hinsdale & Devereaux:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the eastern district of North Carolina, wherein the Board of Commissioners of the county of Washington are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 7th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

(S'g'd) HUGH L. BOND,
Judge of the Circuit Court of the United States for the Eastern District of North Carolina.

Endorsed: We hereby acknowledge service of the within citation and waive copy thereof. (S'g'd) Hinsdale & Devereux, Gatling & Whitaker, att'ys for Edward Sallinger.

65 UNITED STATES OF AMERICA,
Eastern District of North Carolina:

I, Chas. M. Busbee, one of the attorneys for the defendants in the case to which this process relates, do hereby certify under oath that I served the citation upon Messrs. Hinsdale & Devereux and Gatling & Whitaker, att'ys for plaintiff, by handing the same to John Devereux, Jr., and Spier Whitaker, of said firms, to read, which they did, and waived service of copy of the same, as will appear by their acknowledgment of service of same.

(S'g'd) C. M. BUSBEE.

Sworn and subscribed before me this 16th day of June, 1883.

N. J. RIDDICK, *Clerk.*

66 UNITED STATES OF AMERICA,, } *ss:*
Eastern District of North Carolina, }

I, N. J. Riddick, clerk of the circuit court of the United States for said district, do certify that the foregoing contains a full, true, and — transcript of the record of said court, in a cause lately pending therein, wherein Edward Sallinger is plaintiff and The Board of Commissioners of Washington County is defendant, excepting such parts thereof as is agreed by counsel for both plaintiff and defendant shall be omitted, together with a correct copy of the writ of error, assignment of error, citation, and bond for costs in the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Raleigh, in said district, this July 5th, 1883.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK, *Clerk.*
By VITRUVIUS ROYSTER,
Deputy Clerk.

Endorsed on cover: E. North Carolina C. C. U. S. No. 273. The Board of Commissioners of the County of Washington, plaintiff in error, *vs.* Edward Sallinger. Filed 6th September, 1883.

Endorsed: We hereby acknowledge service of the within citation and waive copy thereof. (S'g'd) Hinsdale & Devereux, Gatling & Whitaker, att'ys for Edward Sallinger.

65 UNITED STATES OF AMERICA,
Eastern District of North Carolina:

I, Chas. M. Busbee, one of the attorneys for the defendants in the case to which this process relates, do hereby certify under oath that I served the citation upon Messrs. Hinsdale & Devereux and Gatling & Whitaker, att'ys for plaintiff, by handing the same to John Devereux, Jr., and Spier Whitaker, of said firms, to read, which they did, and waived service of copy of the same, as will appear by their acknowledgment of service of same.

(S'g'd) C. M. BUSBEE.

Sworn and subscribed before me this 16th day of June, 1883.
N. J. RIDDICK, *Clerk.*

66 UNITED STATES OF AMERICA, } ss:
Eastern District of North Carolina, }

I, N. J. Riddick, clerk of the circuit court of the United States for said district, do certify that the foregoing contains a full, true, and — transcript of the record of said court, in a cause lately pending therein, wherein Edward Sallinger is plaintiff and The Board of Commissioners of Washington County is defendant, excepting such parts thereof as is agreed by counsel for both plaintiff and defendant shall be omitted, together with a correct copy of the writ of error, assignment of error, citation, and bond for costs in the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Raleigh, in said district, this July 5th, 1883.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK, *Clerk.*
By VITRUVIUS ROYSTER,
Deputy Clerk.

Endorsed on cover: E. North Carolina C. C. U. S. No. 273. The Board of Commissioners of the County of Washington, plaintiff in error, *vs.* Edward Sallinger. Filed 6th September, 1883.

119-126

FILED
MAR 19 1886
JAMES H. McKENNEY,
CLERK.

No. 273.

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1885.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

EDWARD SALLINGER, DEFENDANT IN ERROR.

BRIEF

OF

C. M. BUSBEE,
ATTORNEY FOR PLAINTIFF IN ERROR.

IN THE SUPREME COURT OF THE UNITED STATES,
October Term, 1885.

THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY, Plaintiff in error,
vs.
EDWARD SALLINGER.
No. 273.

STATEMENT OF CASE.

This is an action at law brought against the Board of Commissioners of Washington County, North Carolina, plaintiff in error, upon five several bonds, similar in tenor, of which the following is one.

NO. 19. OFFICE OF BOARD OF COMMISSIONERS OF THE COUNTY OF WASHINGTON, N. C.

Twelve months after date, with interest from date at the rate of six per cent. per annum, The Board of Commissioners of Washington County promise to pay to Louis M. Hornthal or his order, one thousand dollars, for value received, and to secure indebtedness contracted for the necessary expenses of said County in the purchase of brick building for court-house. This first day of October, 1877.

J. G. AUSBORNE, [SEAL.]
Ch'mn of the Board of Commissioners of Washington County.

[Seal of Washington County.]

Countersigned:
W. H. STUBBS,
Register of Deeds and Clerk of said Board.

I. Upon the trial the defendant (the plaintiff in error) offered in evidence the exhibit accompanying the answer marked "A," which upon objection was excluded by the Court and defendant excepted.

This evidence was the record of the action of James F. Norman *v.* The Board of Commissioners of Washington County, Louis M. Hornthal *et al.*, begun in the Superior

Court of Washington County on November 23rd, 1877, and in which action an injunction was granted on November 30th, 1877, "enjoining the defendant Board of Commissioners from removing the site of the Court-house of said County from lot No. 115 in the town of Plymouth or expending any public monies on the repair of the building on lot No. 149 under the order and proceedings heretofore by them had and made; and enjoining them from executing and issuing any county bonds or bond in payment of the building on said lot No. 149 under said orders and proceedings and enjoining them from the levying or collecting any taxes for the purpose of paying said bonds, whether now issued or not; and enjoining the defendant, the treasurer of said county, J. E. Jackson, from paying any bond or bonds issued or that may be issued for any such purpose, under any proceedings heretofore had before the defendant Board of Commissioners; and enjoining the defendants L. H. & L. M. Hornthal from selling, transferring or negotiating any of said bonds or sending them beyond the jurisdiction of this Court."

See pages 14 to 20 of printed record.

II. The defendant offered in evidence the exhibit marked "B" (printed record pages 23, 24, 25) purporting to be the proceedings of the Board of Commissioners of Washington County, to show that the action of said Board in executing and issuing the said bonds was *ultra vires*, in that the statutes regulating such matters had not been observed or complied with, in that the action of the Board of Commissioners had not been had at the regular September meeting of the Board, nor by the unanimous vote of the said Board, nor upon notice, as provided in Battle's Revisal, chap. 27, sec. 8, sub. sec. (8): and further, that the Commissioners had no power to purchase real property without the concurrence of a majority of the justices of Washington County, sitting with them, under the provisions of chap. 141, sec. 5, Laws of 1876–7.

It was proven that the Court-house of Washington County was destroyed by fire in the Spring of 1872, and that in August following the defendant rented the building for the purchase of which these bonds were issued, which is situated about two hundred yards from the Court-house which was destroyed by fire, in the town of Plymouth, and before the succeeding Fall Term of the Superior Court, the defendant gave notice by public advertisement for thirty days, declaring the house so rented to be the public Court-house of Washington County, and that courts were held continuously therein until the commencement of this action.

It was also in evidence that the paper dated Sept. 24th, 1877, (on page 23 of printed record) was signed by a majority of the justices of the county, and that the bonds, which were payable at one, two, three, four and five years, were endorsed to the plaintiff for value by Louis M. Hornthal the obligee, on April 26th, 1878, and without notice of any defence thereto.

The statutory provisions conferring power upon the Board of Commissioners in the premises were at the date of the execution of said bonds as follows:

"The commissioners (of a county) have power * * * * (8) to remove or designate a new site for any county building: but the site of any county building already located shall not be changed unless by a unanimous vote of all the members of the Board at the September meeting, and unless upon notice of the proposed change, specifying the new site. Such notice shall be published in a newspaper printed in the county, if there be one, and posted in one or more public places in every township in the county for three months next immediately preceding the annual meeting at which the final vote on the proposed change is to be taken. Such new site shall not be more than one mile distant from the old, except upon the special approval of the General Assembly." Laws of North Carolina, 1868, chap. 20, sec. 8, sub-sec. (8); Battle's Revisal (1873), ch. 27, sec. 8, sub-sec. (8).

SEC. 5. The justices of the peace for each county on the first Monday in August, one thousand eight hundred and seventy-eight, and on the first Monday in August every two years thereafter, shall assemble at the court house of their respective counties, and a majority being present, shall proceed to the election of not less than three nor more than five persons, to be chosen from the body of the county (including the justices of the peace), who shall be styled the board of commissioners for the county of ....., and shall hold their offices for two years from the date of their qualification, and until their successors shall be elected and qualified. But those elected on the first Monday in August, one thousand eight hundred and seventy-eight, shall enter upon the duties of their office immediately upon the expiration of the term for which the board of county commissioners now in office have been elected, and not before. They shall be qualified by taking the oath of office before the clerk of the superior court, or some judge or justice of the peace, as now prescribed by law, and the register of deeds shall be, ex-officio, clerk of the board of commissioners; *Provided, however*, that the board of commissioners shall not have power to levy taxes, to purchase real property, to remove or designate new sites for county buildings, to construct or repair bridges, the cost whereof may exceed five hundred dollars, or to borrow money for the county, nor alter or make additional townships, without the concurrence of a majority of the justices of the peace sitting with them; and for the purposes embraced in this proviso the justices of the peace of the county shall, with the board of commissioners, on the first Monday in August, one thousand eight hundred and seventy-eight, and annually thereafter, unless oftener convened by the board of commissioners, who are hereby empowered to call together the justices of the peace when necessary, not oftener than once in three months, but for such services the justices of the peace shall receive no compensation. Laws of 1876–'77, chap. 141, sec. 5.

The defendant asked the court to instruct the jury that upon the proof, the purchase by the Board of Commissioners of the building from L. M. Hornthal was *ultra vires*, that the contract of purchase was void and that the plaintiff could not recover.

The court declined so to charge and defendant excepted.

The court directed the jury that upon the evidence the plaintiff was entitled to recover. Defendant excepted.

ASSIGNMENT OF ERROR.

That the Court below refused to direct a verdict for the defendant, and directed a verdict for the plaintiff.

BRIEF OF ARGUMENT.

The Board of Commissioners had no power to remove the site of the court house nor to enter into the contract with Hornthal for the purchase of a new site for the same, and to issue county bonds to secure the purchase money, except as authorized by the statute. The power to do so was dependent upon a compliance with the provisions of the statute, that is to say, to remove the site of the court house and to designate a new site, and to purchase a building therefor, and issue bonds to secure the purchase-money, the action of the Board of Commissioners must have been:

1st. Authorized by a unanimous vote of all the members of the Board.

2nd. At the regular September meeting.

3rd. Upon notice as directed by the statute. Battle's Revisal, ch. 27, Sec. 8, sub-Sec. (8).

The failure of the Board to comply with these plain requirements of the statute, rendered their action in the premises *ultra vires* and void. The failure was not a mere irregularity in the execution of a power, but the very existence and essence of the power was based upon a compliance with the statutory requirements, which were conditions precedent to the grant of power. "The site of any county building shall *not be changed unless by a unanimous vote, etc.*" No power whatever was vested in a *majority* of the Board,

nor in the full Board except *at its September meeting* and after notice. And if there was no power in the Board, the bonds are invalid. *Hayes v. Holly Springs*, 114 U. S., 120.

Negotiable bonds issued by a municipal corporation without authority of law are void in the hands of an innocent holder. *Marsh v. Fulton*, 10 Wall., 676; *St. Joseph Township v. Rogers*, 16 Wall., 644.

Holders of municipal bonds are chargeable with notice of the statutory provisions under which they are issued. *Ogden v. County of Daviess*, 102 U. S., 634; *Anthony v. County of Jasper*, 101 U. S., 693.

Every person dealing in them must at his peril take notice of the existence and terms of the law which it is claimed conferred the power to issue them, no matter under what circumstances he may obtain them. *Ottowa v. Perkins*, 94 U. S., 260.

In this case the fact of compliance or non-compliance with the terms of the statute was a matter of record and the purchaser from Hornthal was bound to ascertain whether or not the power to make the bonds had arisen in the Board. He bought them at his own peril. In fact upon an inspection he would have seen that upon their face the bonds purported to be issued at the October session of the Board, at which session the Board had no power to act in the premises, and on the record of the proceedings of the Board (printed record, pages 23 *et seq.*,) he would have seen that they *were in fact* issued at its *October* meeting, by a majority vote and without notice.

III.

If the bonds showed upon their face, by way of recitals, a compliance with the terms of the statute under which the Board assumed to act, the plaintiff in error would be estopped, under *Knox v. Aspinwall*, 21 How., 539; *Coloma v. Eaves*, 92 U. S., 484, and other cases, from showing the contrary.

But such is not the fact. There is no recital in the bond even tending to show that the Board complied with the requirements of the statute in entering into the contract of purchase and issuing the bonds to secure the purchase money. The only recital is "for value received and to secure indebtedness contracted for the necessary expenses of said county in the purchase of brick building for court house." This was stated for a special purpose hereafter alluded to.

There is nothing upon the face of the bonds constituting an estoppel upon the plaintiff in error from setting up the defences relied upon in this action.

The decisions of this court, holding municipal corporations liable for the performance of their contracts, when their action in executing the contracts was in violation and defiance of the laws under which they acquired the power to contract, have been based upon the doctrine of an *estoppel in pais* growing out of recitals in the face of the contract which the corporation could not be heard to controvert.

The bonds sued upon in this action contain no recitals showing that they were issued in pursuance of the statute.

They do not recite that they are issued "in conformity to the provisions of the statute" as in *County of Moultrie v. Savings Bank*, 92 U. S., 631; or that they were issued "by virtue of and in accordance with" the statute as in *Coloma v. Eaves*, 92 U. S., 484.

The bonds of a municipal corporation containing no recitals and not issued in accordance with the statute are invalid in the hands of *bona fide* holder. *Bank v. Bergen County*, 115 U. S., 384.

The holder can not recover unless the mere *fact* of the execution of the bonds is in itself conclusive proof that they were executed in pursuance of the statute, and this court in the case of *Buchanan v. Litchfield*, 102 U. S., 278, declare that such is not the law.

And even recitals in a bond issued by a municipal corporation do not exclude inquiry as to whether they were not

made in violation of the constitution and laws of the State. *School District v. Stone*, 106 U. S., 186; *Carroll County v. Smith*, 111 U. S., 556.

IV.

Again, the Board of Commissioners did not have the power to make the contract in question, and to issue the bonds in pursuance and execution of the same. The statute law of North Carolina, chap. 141, section 5, Laws of 1876–'7. above cited, expressly declares that the Board of Commissioners (of any county) *shall not have the power* to levy taxes, *to purchase real property, to remove or designate new sites for county buildings*, * * * without the concurrence of a majority of the Justices of the Peace, *sitting with them.*

Here there was an absolute lack of power in the Board, acting alone, to make the contract in question which was the purchase of land and the removal and designation of a new site for a court house, and to carry the same into execution by the issuance of the bonds upon which this action is brought.

The law is explicit and mandatory. The power is conferred upon the Board and the justices of the county *jointly.*

The Board sitting alone had no power to make the contract or to remove the court house by the purchase of a new site. The evidence shows that they did act alone. The paper signed by the justices was signed on September 27th, 1877, and the action by the Board was taken at their session on October 1st. The presentation to the Board of the paper signed by the justices was not a compliance with the law. It could not confer any power on the Board.

If the bonds contained a recital that they were issued to secure a debt contracted by the Board and the justices of the county sitting together, the corporation would be estopped to deny it. But they contain no such recital.

For the reasons and upon the authorities above cited, the plaintiff in error insists that the action of the Board of Com-

missioners in the execution of the bonds sued on, was *ultra vires*, and that the bonds are invalid in the hands of the defendant.

V.

The case as the bill of exceptions shows was heard and determined below upon the construction and effect of the statute law cited.

But in order to exclude a conclusion the plaintiff in error submits that the constitution of North Carolina has no bearing upon the question involved in this case.

Article 7, section 7, is as follows:

No county, city or town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein.

In the case of *Brodnax vs. Groom*, 64 N. C. Reports, 244, decided in 1870, the Supreme Court of North Carolina held that the County Commissioners were the sole judges of what were necessary county expenses.

The recital in the bonds sued on shows only that they were executed to secure an obligation, the validity of which did not depend upon a popular vote.

It cannot be questioned that the legislative authority had power to direct in what manner, and in what manner alone, municipal corporations, which are the creatures of the Legislature, should contract debts even for necessary expenses of the municipality; and no power existed in the Board of Commissioners unless acquired and exercised in pursuance of the legislative mandate.

If the Constitution recognized and warranted the contracting of debts for necessary expenses, without the sanction of a popular vote, the Legislature could enact that certain of such debts could only be contracted upon a unanimous vote of the Board of Commissioners, at certain stated meetings, upon notice, &c., which it did; and the power to

so contract did not accrue to the Board of Commissioners until the requirements of the law had been observed.

The section of the Constitution cited confers no authority upon the municipality as to the location or removal of sites for county buildings, or the purchase of real estate. In respect thereto there is no provision in the Constitution or laws of the State other than the statutes above cited, and these have never been construed by the Supreme Court of the State.

C. M. BUSBEE,
Attorney for Plaintiff in Error.

119-176

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 35.

THE COMMISSIONERS OF WASHINGTON COUNTY

vs.

SALLINGER.

JOHN W. HINSDALE,
S. F. PHILLIPS,
For Sallinger.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 35.

THE COMMISSIONERS OF WASHINGTON COUNTY

vs.

SALLINGER.

BRIEF FOR THE DEFENDANT IN ERROR.

This was an action brought by Sallinger to recover a debt evidenced by a series of five bonds, for $1,000 each, executed by the commissioners.

Originally (September, 1879) the suit covered only one of these bonds, but by amendment and consolidation (at November term, 1881, Record, p. 10) now embraces the *five*.

The facts are sufficiently stated in the brief of the learned counsel for the plaintiffs in error. It is enough to repeat here that the bonds are dated October 1, 1877, and were negotiable, and given to pay for a building bought by the commissioners from one Hornthal for a court-house. (Face of bonds, pp. 10, &c.) Hornthal endorsed the bonds, *bona fide*, before maturity, and for value, to Sallinger. It appears (p. 22) that the former court-house had been destroyed by fire in the spring of 1872; that in August after-

wards the commissioners had rented the building now in question (for what term is not said), and immediately, by public notice for thirty days, announced it to be the public court-house, and that continually since, to the beginning of this suit, courts have been held there. It also appears that the Board of Commissioners consisted of five persons, and that the purchase in question was ordered by a majority vote (*one* in the *negative*) at a special meeting held October 1, 1877, and that at such meeting a paper was presented and filed, signed by a majority of the justices of the peace for the county, asking that the purchase be made, and at the price afterwards given. At another special meeting (p. 24) the chairman reported his having made the purchase, &c., and thereupon the same was approved, the order of approval being *signed* by three of the board other than the chairman, and no dissent appearing.

No objection to the validity of such purchase and contract to pay is now made except upon the score of *the power of the commissioners thereabouts under the above circumstances;* nor is any objection now suggested to the administration of the trial below, except in so far as the learned judge instructed the jury that the commissioners had such power under the circumstances.

The better to understand the questions presented under the North Carolina law it is proper to say that by the constitution of 1868 it was provided that there should be, amongst other officers in every county; five commissioners, biennially to be elected by the qualified voters therein, and in every township at least two justices of the peace; the General Assembly, however, to have power to change these provisions. (Art. VII, sects. 1, 5, and 14; Code 1883, vol. 2, pp. 709, &c.) By an act passed originally in 1816 (Code of 1883, sec. 782) it is provided that "There shall be kept and maintained in good and sufficient repair in every county a court-house and common jail, at the expense of the county,"

&c.; and by the act of 1868 (C. 20) it is enacted (*sec.* 2) that the powers of the county "can only be exercised by the Board of Commissioners;" (*sec.* 3), that "a county is authorized (2) to purchase and hold lands within its limits and for the use of its inhabitants." (Code of 1883, sects. 703 and 704.) (*Sec.* 5), the "Board of Commissioners in each county shall hold *a regular meeting at the court-house* on the first Monday in September and March in each year;" and (*sec.* 8) "the commissioners have power: * * * (7) to purchase real property necessary for any public county building," &c.: (8) [quoted in the brief for comm'rs, p. 3], "to remove or designate a new site for any county building; but the site of any county building already located shall not be changed unless by a unanimous vote of all the members of the board *at the regular September meeting*, and unless upon notice" [by advertisement for three months, &c.] of the proposed change specifying the new site.

The above legislation remained in force until the act of 1876–'77, ch. 141 [27th February], which abrogated the previous provisions in the constitution of 1868 (above) for the election of *county commissioners* and *justices of the peace*, and provided that the latter officers should be elected by the General Assembly, at its then present and succeeding sessions, and that these, in turn, *on the 1st of August*, 1878, *&c.* [as quoted in the brief for the commissioners, p. 4], should elect county commissioners, &c. (See Code of 1883, sects. 818, 819, and 716.)

[It seems plain from this that the provisions of the act of 1876–'77 in regard to commissioners applied to those only *who were to be elected in and after August*, 1878, and, therefore, *not* to such as were in office in October, 1877—*ex. gr.*, those who made the purchase in question.]

The learned counsel for the commissioners contends that the contract for purchase in question was void upon two distinct grounds:

(1.) *It involved a change of the court-house site;* and this was done without an observance of certain statutory conditions *precedent* to the existence of such power.

(2.) *The purchase* required concurrence by the justices of the peace of the county, under the act of 1876'–7 (above).

[Inasmuch as it seems plain that the commissioners had power to purchase under the circumstances in the record detailed, it has been thought unnecessary to examine the position taken by the learned counsel (upon p. 5, "II") as to the effect to be ascribed to the purchase of the bonds by Sallinger. And again, as it is to be admitted that art. 7, sect. 7, of the State constitution has no bearing upon the present question, no other reference than the present need be made to the remarks under *heading* "V." (Brief, &c., p. 9.)]

(1.) As regards the matter of *change of site.*

(*a.*) It is submitted *that such change had been already validly made*, viz., by what occurred after the fire in 1872. The building then rented was then announced to be the court-house, and this seems to have been followed by unanimous public conformity thereto during five years. Since that time there has been no further change. The building thus announced, and accepted by the public was the same that subsequently was purchased. Even if one could admit as true the very difficult theory that the provisions about *county buildings* in the statute of 1868 (brief, &c., p. 3) apply to a *court-house where the former court-house is destroyed*,—yet, inasmuch as those provisions were plainly intended only to give ample notice to the community most interested in the removal (that is, *the county*), it seems inadmissible to contend that after a destruction by fire, and a *bona fide* notice of *removal*, followed by such a state of things during five years as must, at an early day therein, have brought the fact of removal to the attention of every person in the county,—all this being attended, too, by a perfect acquiescence of all,—

the present resort to technicalities (as to the *form* of notice) is permissible against a *bona fide* dealer in negotiable county securities!

(*b.*) The "*regular meeting in September*," at which changes of the sites of county buildings were, by act of 1868, required to be made, was also by the same provision (sec. 5, above) to be held *at the court-house*. This creates a dilemma. Either the site of the Washington county court-house had already, at the time of the purchase in question, been changed, so that there was then a court-house at which to meet, or there was then no such court-house anywhere, and therefore no such regular meeting at a court-house possible. Under the former alternative no change of site was in contemplation or effected by the purchase in October, 1877, but, on the contrary, only a confirmation of a former change. Under the latter alternative it is evident that the statutory provision requiring *a regular meeting at the court-house* does not extend to cases in which a "court-house" is non-existent.

It seems that this latter test of the applicability of the statutory provision to the case in question is the correct one. No part of that provision extends to exigencies created by the destruction of a court-house; and during the existence of that exigency any questions arising as to change of site, *temporary* or *permanent*; *change* to a building *leased* or to one *bought* in fee; *change for a temporary period to a house rented*, or *for like temporary period to one bought* (with intention *in the end to resell* and return to the old site)—all these are questions of local economy properly left with the county authorities, questions of a sort which courts are often ineffectually resorted to for the purpose of controlling,—a question *of power* being raised for that purpose, when the real contention is only as to *discretion*.

(2.) As regards the second point of the learned counsel, it is repeated that there has been no legislation in North Carolina